UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-4044

GRINNELL FIRE PROTECTION SYSTEMS COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Grinnell Fire Protection Systems Company ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board order against the Company. The

Board's Decision and Order issued on November 15, 2000, and is reported at 332 NLRB No. 120. (JA 190-195.)[1]

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices affecting commerce. This Court's jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) is based on the Company's assertion that it transacts business within this judicial circuit.

The Board's order is a final order under Section 10(e) of the Act. The petition for review, filed by the Company on December 26, 2000, was timely, as was the Board's cross-application for enforcement, filed on January 31, 2001; the Act places no time limits on such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with the names and addresses of bargaining unit employees, including strike replacements.

NLRB v. Acme Industrial Co., 385 U.S. 432 (1967)

WCCO Radio, Inc. v. NLRB, 844 F.2d 511 (8th Cir.), *cert. denied*, 488 U.S. 824 (1988)

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[1] "JA" references are to the Joint Appendix filed with the Company's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Procter & Gamble Mfg. Co. v. NLRB, 603 F.2d 1310 (8th Cir. 1979)

National Labor Relations Act, 29 U.S.C. § 151, et seq.

Section 8(a)(1) (29 U.S.C. § 8(a)(1))

Section 8(a)(5) (29 U.S.C. § 8(a)(5))

STATEMENT OF THE CASE

The instant unfair labor practice case came before the Board on two complaints issued by the General Counsel after investigation of charges filed by the Road Sprinkler Fitters Union, Local 669, United Association of Journeymen and Apprentices of the Plumping and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("the Union"), alleging that the Company repeatedly refused to provide relevant bargaining information. Following a hearing on the consolidated complaints, an administrative law judge issued a decision and recommended order on February 8, 2000, finding merit in the complaint allegations. (JA 183-187.) The Company then filed exceptions to the administrative law judge's conclusions and recommended order. (JA 1.) The Board (Members Fox, Liebman and Hurtgen) issued its decision and order on November 15, 2000, affirming the administrative law judge's conclusion that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to bargain in good faith with the Union when it refused to provide the Union with the names and addresses of bargaining unit employees.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Collective-Bargaining Agreement Expires and the Union Declares a Strike

The Company supplies and installs automatic sprinkler and fire protection systems in states throughout the country. (JA 192-193.) Since 1915, the Union has been the exclusive collective-bargaining representative of a nationwide unit composed of the Company's sprinkler fitters and their apprentices. (JA 193; 29.)

The most recent collective-bargaining agreement between the Union and the Company expired on March 30, 1994. (JA 193; 29.) On about April 12, 1994, after unsuccessful contract negotiations, the Union declared a nationwide strike against the Company.[2] (JA 193.) The Company continued to operate with nonstriking union members and by hiring a large number of sprinkler fitters and apprentices to replace its striking employees. (JA 193; 52.)

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[2] Shortly after the strike began, the Union filed unfair labor practice charges against the Company alleging, among other things, that the Company had failed to bargain in good faith. On January 16, 1997, an administrative law judge issued a decision finding that the Company had failed to bargain in good faith and, therefore, that the Union's strike was an unfair labor practice strike. On May 28, 1999, the Board affirmed the judge's finding, and ordered the Company to bargain with the Union and restore the terms of the expired agreement. *Grinnell Fire Protection Sys. Co.*, 328 NLRB No. 76 slip op. at 2 (May 28, 1999). On December 29, 2000, the United States Court of Appeals for the Fourth Circuit affirmed the Board's findings and enforced its order. *Grinnell Fire Protection Sys. Co. v. NLRB*, 236 F.3d 187 (4th Cir. 2000).

B. The Union Twice Requests Names and Addresses of Company Employees; the Company Refuses To Provide the Information

On October 19, 1998, the Union sent a letter to the Company seeking to resume negotiations for a new collective-bargaining agreement. (JA 93.) The letter reminded the Company that it was required to remedy the unfair labor practices which, by that time, had been found by the administrative law judge in the related case, and requested:

> In preparation for our future discussions, please forward to this office . . . a current list of all [unit] employees . . . indicating the employee's name, address, dates of employment, job title or classification, rate of pay and fringe benefits.

(JA 193; 92.)

On December 1, 1998, the Company's vice president for human resources responded by letter to the Union's request for information, asserting that the Company had no legal obligation to reinstate the terms and conditions of the expired contract, and questioning "the Union's intent with respect to its request for information ostensibly for bargaining purposes." (JA 193; 94.) The letter requested that the Union "clarify the purpose of its request for consideration." (JA 193; 94.)

By letter dated June 7, 1999, the Union requested the same information it had previously requested, and specifically requested the names, addresses, and dates of employment of all employees enrolled in apprenticeship programs since May 1, 1994, shortly after the strike began. (JA 193; 95.) The letter also requested documents

describing the terms and conditions of the apprenticeship programs in which the Company enrolled the employees. (JA 95.)

The Company sent a letter to the Union on September 23, 1999, stating that it was enclosing documents describing its apprenticeship programs, but advising the Union that it would not provide any of its employees' names and addresses. (JA 193; 98.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with the names and addresses of bargaining unit employees, including strike replacements. The Board's order requires the Company to cease and desist from the unfair labor practice found, and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights under the Act. Affirmatively, the Board's order requires the Company to provide the requested information to the Union and to post a remedial notice and mail a copy of the notice to all current and former employees employed by the Company since March 1, 1994.

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's conclusion that the Company violated Section 8(a)(5) and (1) of the Act when it refused to provide the Union with the names and addresses of company employees. It is settled law that, within the context of a

collective-bargaining relationship, an employer must furnish the union with requested information that the union needs to perform its representative functions. Information identifying unit employees, including strike replacements, is presumptively relevant, and the Company was required to provide it to the Union upon request unless it established that the information either was not relevant or was not requested in good faith.

The Company has not carried that burden here. The Company does not challenge the relevancy of the information sought concerning the employees who were not strike replacements. As the Board observed, the information about strike replacements was also relevant because, after the strike ends, the Union will represent any replacements who remain in their unit positions. Accordingly, any collective-bargaining agreement the Union negotiates will apply to the strikers and strike replacements alike.

The Company's assertions that the Union planned to use the information to raid the Company's workforce and that it could lose its ability to hire strike replacements are based on pure speculation. The Union's vice president testified without contradiction, and the Board found, that the Union requested the information in order to negotiate a new collective-bargaining agreement. The Company offers no evidence contravening the Board's finding.

The Company's contention that the Union should be required to bargain to accommodate the Company's concerns about misuse of the information is also groundless. The Board may require that a union bargain with the employer over an approach to releasing relevant information only where the employer first demonstrates a legitimate and substantial concern. The Company has totally failed to demonstrate such a concern here.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO PROVIDE THE UNION WITH THE NAMES AND ADDRESSES OF BARGAINING UNIT EMPLOYEES

A. Applicable Principles and Standard of Review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." An employer's statutory duty to bargain in good faith includes the duty "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435-437 (1967). *Accord WCCO Radio, Inc. v. NLRB*, 844 F.2d 511, 514 (8th Cir.) (citing cases), *cert. denied*, 488 U.S. 824 (1988). The employer's duty to provide information includes both information requested in order to administer an existing collective-bargaining agreement and information requested to facilitate the negotiation of a new collective-bargaining agreement. *WCCO Radio, Inc. v. NLRB,* 844 F.2d at 514.

Accord Acme Industrial Co., 385 U.S. at 435-436; *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979). The failure to provide relevant information upon request is a breach of an employer's duty to bargain in good faith, and therefore violates Section 8(a)(5) of the Act. *Procter & Gamble Mfg. Co. v. NLRB,* 603 F.2d at 1315; *Amcar Div. of ACF Industries v. NLRB,* 592 F.2d 422, 431-432 (8th Cir. 1979). [3]

The Supreme Court has adopted a liberal, "discovery-type" standard by which the relevance of requested information is to be judged. *NLRB v. Acme Industrial Co.*, 385 U.S. at 437 & n.6. *Accord Supervalu, Inc.-Pittsburgh Div. v. NLRB*, 184 F.3d 949, 952 (8th Cir. 1999). Under that standard, it need not be shown that the requested information would resolve any dispute between the parties. *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d at 1315. Instead, the employer must provide the union the information if there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Acme Industrial Co. v. NLRB*, 385 U.S. at 437. *Accord Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d at 1315 (employer must provide information "unless it is clearly irrelevant").

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[3] Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(5) of the Act therefore results in a "derivative" violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Names and addresses of bargaining unit employees--including strike replacement employees--are "presumptively relevant." *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d at 1315; *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1093 (1st Cir. 1981). Such information must be made available "'without regard to its immediate relationship' to [a collective-bargaining] agreement or to its 'precise relevancy' to particular bargaining issues." *The Detroit News*, 270 NLRB 380, 381 (1984), *enforced mem.* 759 F.2d 959 (D.C. Cir. 1984) (quoting *NLRB v. Whitin Machine Works*, 217 F.2d 593, 594 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955)). An employer may rebut the presumption that information is relevant if it demonstrates that the information is irrelevant or that it was requested in bad faith. *WCCO Radio, Inc. v. NLRB*, 844 F.2d at 514. *See also New England Newspapers, Inc.*, 856 F.2d 409, 413-414 (1st Cir. 1988). A union's request for presumptively relevant information, however, is presumed to be in good faith "until the contrary is shown." *Columbia University*, 298 NLRB 941, 945 (1990). *See also NLRB v. AGC of California*, 633 F.2d 766, 772 (9th Cir. 1980).

The duty to furnish information ultimately "depends on the particular facts in each case." *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d at 1315. *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956). Accordingly, the scope of review "is very narrow," and the Court "must affirm the Board's decision if it is substantially supported by the evidence and reasonably based in law." *WCCO Radio, Inc. v. NLRB*,

844 F.2d at 514. Under that standard, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1261 (8th Cir. 1994).

B. The Company Refused To Provide the Union with Information Relevant and Necessary to its Collective-Bargaining Obligation

It is undisputed that the Union twice requested the names and addresses of unit employees, and that the Company refused to furnish that information. (JA 190, 193.) As shown, information concerning names and addresses of unit employees is presumptively relevant. Accordingly, unless the Company can show either that the information the Union requested was not, in fact, relevant, or that the Union requested the information in bad faith, the Company violated Section 8(a)(5) and (1) of the Act. *See Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d at 1315.

The Company claims (Br 31) that the information requested concerning the strike replacements was not relevant because there was a strike in progress, "with no end in sight." That argument has no merit because, even though the Union was on strike, it remained responsible for representing the unit in bargaining. *See Soule Glass and Glazing Co. v. NLRB*, 652 F.2d at 1075 n.8, 1096. As the Board stated, in explaining why the information is presumptively relevant (JA 190), although the Union could not insist on bargaining over the terms under which the replacements

worked during the strike, once the strike ended, strike replacements who remained "assume[d] the same status as other unit employees." *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 792 (1990) ("the interests of strikers and replacements . . . may converge after the strike"). Accordingly, in bargaining for a new collective-bargaining agreement, a union is "bargaining over terms that will be applicable to all unit employees, including those who worked as replacements during the strike." (JA 190.) *See Detroit Newspapers*, 327 NLRB 871, 871 (1999) (quoting *Service Electric Co.*, 281 NLRB 633, 639-40 (1986)).

The relevance of the requested information is made clear here by the Union's requests to continue bargaining with the Company despite engaging in a strike. Thus, in its October 19, 1998 letter, the Union asked the Company to furnish the information "[i]n preparation for our future discussions," and stated that the Union was interested in "restoration of our collective bargaining relationship . . . ."[4] (JA 92-93.)

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[4] Contrary to the Company's claim (Br 15), by also asserting in its October 19, 1998 letter that the Company was obligated to remedy its unfair labor practices before the parties could engage in negotiations, the Union was not stating that it would not bargain with the Company. Instead, as the Board reasonably found (JA 194), the Union merely urged the Company to take the affirmative action that the Board had required it to in an earlier decision, and which the Company had not yet taken, namely, to bargain in good faith to either an agreement or impasse. *See Grinnell Fire Protection Systems Co.*, 328 NLRB No. 76 at 24 (May 28, 1999), *enforced* 236 F.3d 187 (4th Cir. 2000). In short, the Union was specifically requesting that bargaining resume.

Accordingly, the Company has failed to rebut the Board's finding (JA 190) that the information the Union requested was relevant.

The Company also argues (Br 19) that it had no obligation to furnish the requested information because the Union made the request in "bad faith." Specifically, the Company speculates (Br 14) that the Union planned to use the information to "systematically eviscerat[e] Grinnell's strike-time workforce," and (Br 31) that the Union's actions would destroy its right to continue to operate with strike replacements.

The Company, however, produced no evidence to support that claim. Rather, the Company relies solely on Union Vice President John Bodine's testimony that he regularly visited company jobsites to share information about the Union with employees and to try to "make them union members." (JA 44.) Bodine acknowledged that he occasionally informed employees about openings at unionized employers and that, with his encouragement, three employees left the Company's employ for other jobs.[5] (JA 46-47.) As the administrative law judge stated (JA 193), the "mere fact that the Union has assisted its members in finding employment with union companies . . . does not suggest that the information request had that purpose." In fact, as the judge also observed (*id*.), "the Union obviously accomplished that goal without the requested information." As the Company offered no evidence supporting its claim of bad faith,

[5] Although there is no related evidence in the record, the Company repeatedly asserts in its brief (Br 4, 14, 31) that it employed "more than 1,000 non-union strike replacements."

the Board, affirming the judge, reasonably found that the Company "failed to demonstrate that the Union's request for information is in any way connected with an improper or unlawful motive." (JA 193.)

Moreover, Union Vice President Bodine also testified, without contradiction and consistent with the Union's letters requesting the information, that the Union sought the names and addresses as the bargaining representative of the employees, to prepare for contract negotiations. (JA 29, 33, 34, 37.) The judge credited Bodine's testimony, recognizing that the Union obviously needed to know the identities of the employees it represented. (JA 193; 29.) The Board reasonably adopted (JA 194) the administrative law judge's finding that the Union sought the information for that legitimate purpose. *See WCCO Radio, Inc. v. NLRB*, 844 F.2d at 514.

The Company is in error when it claims (Br 13, 17-18) that the Board's decision is flawed because neither the administrative law judge nor the Board made more specific findings concerning the Union's purpose for seeking the information. This contention would require the Union to prove its specific purpose for the requested information. As the Board stated (JA 190-191), that requirement that the Union prove its specific purpose for the requested information would place the burden on the Union "to demonstrate good faith by proving that it had a valid purpose for requesting relevant information, even when its stated reasons were valid." As we have shown,

that is not the Union's burden. *See Oil, Chemical & Atomic Workers Local U. v. NLRB*, 711 F.2d 348, 362-363 (D.C. Cir. 1983), and cases cited.

The Company's reliance (Br 20) on *Columbia University*, 298 NLRB 941 (1990), and *Gunn & Briggs, Inc.*, 267 NLRB 944 (1983), for the principle that a union is not entitled to relevant information where the request is made in bad faith, does not support its position. Rather, both cases hold that a union is entitled to information where, as here, there is uncontroverted testimony that the union has reason to believe that the information is relevant to its duties as collective-bargaining representative. Thus, in *Columbia University*, the Board ordered the employer to produce staff promotion information to the union, stating that "where a union's request is for a proper and legitimate purpose, it cannot make any difference that there may also be other reasons for the request or that the data may be put to other uses." 298 NLRB at 946-947, citing *AGC of California*, 242 NLRB 891, 894 (1979), *modified and enforced* 633 F.2d 766 (9th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Similarly, in *Gunn & Briggs, Inc.*, the Board ordered the employer to provide payroll data to the union, stating that it would not ascribe to the union the bad faith claimed by the employer, even where the union had engaged in activity that "cast[] doubt on the good faith of the union's request for the payroll information." 267 NLRB at 947.

Nor is the Company's argument (Br 20) advanced by this Court's decision in *NLRB v. Wachter Constr., Inc.*, 23 F.3d 1378 (1994) ("*Wachter*"). There, unlike here,

the Court found that the union made an unprecedented request for "voluminous" amounts of information amid "specific evidence" that the union's intent was to harass the employers, and ultimately to coercively dissuade them from exercising their contract rights. *Id.* at 1380-1384, 1387-88. As we have shown, none of those factors is present here.

Similarly, the Company's reliance (Br 23) on *NLRB v. Hawkins Constr. Co.*, 857 F.2d 1224 (8th Cir. 1988), is misplaced. There, the Court refused to enforce the Board's order because it found that the Board had improperly rejected an administrative law judge's credibility determinations. 857 F.2d at 1226. Relying on the judge's credibility determinations, the Court found bad faith where the union requested information solely in retaliation for a prior lawsuit the employer had brought against it. *Id.* Here, there is simply no contrary record evidence--credited or not--to that supports the Company's claim that the Union acted in bad faith.

Nor, as the Company claims (Br 24), does *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), support its argument. The record in *Soule Glass and Glazing Co.* reflected a history of striking employees assaulting, threatening, and vandalizing the property of replacements, leading the court to conclude that the disclosure of strike replacements' names and addresses to the union would pose "a clear and present danger" to the replacements. 652 F.2d at 1097. The record here is barren of such evidence.

D. The Company's Remaining Argument Is Without Merit

The Company contests (Br 32) the Board's remedy, asserting that it does not allow the Company an opportunity to bargain over conditions to safeguard the information requested. This contention is based on its totally unsubstantiated claim that the Union will use the information to raid its workforce.

To be sure, the Board may require a union to bargain over an approach to the release of relevant information where the employer first demonstrates a legitimate and substantial claim of confidentiality or burdensomeness. *See, e.g., Oil, Chemical & Atomic Workers Local U. v. NLRB*, 711 F.2d 348, 362-363 (D.C. Cir. 1983), and cases cited; *General Dynamics Corp.*, 268 NLRB 1432, 1433 (1984); *Plough, Inc.*, 262 NLRB 1095, 1096 (1982).

Here, however, no bargaining is appropriate because the Company has failed to demonstrate any legitimate concern that justifies withholding the information. Accordingly, the Board properly rejected (JA 191) the Company's request for an accommodation.

The cases the Company cites (Br 32-34) to support its argument for accommodation are inapposite. In each case, the employer timely asserted and demonstrated a legitimate confidentiality concern, and none of them concerned the type of presumptively relevant information at issue here. Thus, in *Detroit Edison Co.*

v. NLRB, 440 U.S. 301, 319 (1979), the Court exempted from disclosure employees' scores on a psychological aptitude test, balancing the union's interest against "[t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence . . . ." In *Metropolitan Edison Co.* , 330 NLRB No. 21 (1999), the Board denied the union similarly sensitive information that identified employees who complained anonymously about a union official. *Kelly-Springfield Tire Co.,* supra*,* cited by the Company, offers even less support. There, the Board required the employer to produce a list of chemicals used in its manufacturing process *despite* the employer's legitimate concern that it would reveal trade secrets, finding that protection of the health and safety of employees outweighed the employer's legitimate business concerns. 266 NLRB 587, 587 (1983). *See also Oil, Chemical & Atomic Workers Local U. v. NLRB*, 711 F.2d at 362-363.

In sum, the Company's refusal to provide the Union with the names and addresses of unit employees--including strike replacements--was without any legitimate justification. The Company has failed to demonstrate that the presumptively relevant information was either irrelevant or requested in bad faith. Accordingly, as the Board found, the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by its refusal to produce the requested information.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enter judgment enforcing the Board's order in full.

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April 12, 2001

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Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Local Rule 28A(c), the Board certifies that its brief contains 4,639 words in proportionally-spaced, 14-point font, and the word processing system used was Microsoft Word 97.

_____

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Dated at Washington, DC
this 12th day of April 2001

UNITED STATES COURT OF APPEALS
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CERTIFICATE OF VIRUS SCAN OF DISKETTE

Pursuant to Local Rule 28(A)(d), the Board certifies that the diskette containing the above-captioned brief has been scanned for viruses and is virus-free.

_____

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Dated at Washington, DC
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Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Board's answering brief have this day been served by first-class mail upon the following counsel at the address listed below:

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